PUBLIC PROSECUTOR

v.

TAN BOON KWAI

HIGH COURT BORNEO, KUCHING
TAN CHIAW THONG J
[CRIMINAL TRIAL NO. LG1 OF 1985]
30 JUNE 1990

CRIMINAL PROCEDURE: *Definition of trafficking - Possession and knowledge - Presumptions - Balance of probabilities - Material witness - Failure of prosecution to explain non service of subpoena - Inferences in favour of accused - Sections 2, 37(d), (da) Dangerous Drugs Act 1952.*

CRIMINAL PROCEDURE: *Cautioned statement - Admissibility of - Manner of administering - Section 37A Dangerous Drugs Act 1952.*

The accused was charged with the offence of trafficking in dangerous drugs under s. 39B(1) of the Dangerous Drugs Act (the Act). On 10 September 1984 a black briefcase was found by police officers in a hotel room occupied by the accused and in a false compartment of this briefcase 14 plastic packets of heroin were discovered. The accused denied that he knew that the briefcase contained these packets nor that these packets contained heroin; he states that he was carrying the briefcase for X who was to have collected it later from the accused. The crucial element for determination in this case is whether the accused satisfied the definition of "trafficking". Observation on the admissibility of cautioned statement.

Held:

[1] The definition of "trafficking" as defined in s. 2 of the Act imposes no presumption against any accused person and the definition requires knowledge by an accused person of any dangerous drug in respect of doing of any of the acts, specified in that definition.

[2] Reading subsection 2 of 37A in light of proviso (b) to subsection (1) of s. 37A of the Act, after a caution under proviso (b) to subsection (1) was administered to an accused person and he made no response after the said caution, and then a question was put to him by the person administering such a caution to the accused, then in accordance with the provisions of subsection (2), it is incumbent on the part of that officer to inform the accused that he shall not be bound to answer the question put to him.

[3] Where there was in existence a material witness such as X who was not called because the subpoena could not be served on him, the Court should have been informed of the circumstances leading to non-service; in the absence of any satisfactory explanation any inference to be drawn should be drawn in favour of the accused.

[4] The accused has succeeded in proving, on a balance of probabilities, that at the place, time and date specified in the charge, he was not in possession of the 14 packets containing heroin and did not know the nature of such drug being heroin. The accused has rebutted successfully the presumptions of possession and knowledge in s. 37(d) and the presumption of possession and trafficking under s. 37(da) as he has succeeded in proving that he was unaware of the existence of the secret compartment in the briefcase.

[Accused acquitted and discharged.]

Cases referred to:
PP v. Badruisham bin Baharum [1988] 2 MLJ 585
Chan Pean Leon v. PP [1956] 22 MLJ 237

Legislation referred to:
Dangerous Drugs Act 1952, ss. 2, 37(d),(da), 37A(1), 39B(1)(a), (2)

For the public prosecutor - Ahmad Zaki
For the accused - Benedict Lim & John Lim; M/s. Tiong, Lim, Wong & Co.

JUDGMENT

Tan Chiaw Thong J:

The accused stands charged as follows:

> That you, on 10 September 1984 at about 1100 hours at Room No. 311, Muhibbah Inn Hotel, Limbang, Fifth Division in the State Sarawak, on your own behalf, did traffic in a dangerous drug, to wit 118.47 grammes of heroin and you thereby committed an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (Revised - 1980) punishable under s. 39B(2) of the same Act.

In order to prove the offence specified in the charge prosecution has to prove beyond any reasonable doubt that (1) the accused on 10 September 1984 at about 1100 hours at Room No. 311, Muhibbah Inn Hotel, Limbang Fifth Division, in the State of Sarawak; (2) on his own behalf; (3) did traffic in 118.47 grammes of heroin.

In respect of the third element of trafficking, the prosecution also relies on the presumptions as set out in s. 37(d) and (da) of the Dangerous Drugs Act 1952 (hereafter called "the 1952 Act").

With regard to the first element (1) above, the evidence for the prosecution shows that on 10 September 1984 at between 11 a.m. and 11.20 a.m., at Room No. 311, Muhibbah Inn Hotel, Limbang, in the Fifth Division of the State of Sarawak, a black briefcase produced as Ex. P32 was found by PW6 and PW7 under a table in the said room which was then occupied by the accused, and that in a false compartment in the said briefcase were discovered 14 plastic packets which on a chemical analysis made subsequent by PW1 were found to contain 118.47 grammes of heroin. The said briefcase Ex. P32 was later brought to the Limbang Police Station where the 14 plastic bags were weighed by PW6 and PW7 and then placed in safe custody. The briefcase was placed in an exhibits store in the said police station, and on the evidence for the prosecution, having regard to the evidence given by Inspector Amir Jamalullaill (PW2) Inspector Harmon Wong (PW6). Sergeant Roland Tay (PW7), Inspector 11507 Yahya Effendi bin Hj. Zakaria (PW5) DSP Robert Limbang (PW4) and Chief Inspector Paul Kundang Atin (PW9), I am satisfied that the briefcase produced as Ex. P32 was the very briefcase which was found by PW6 and PW7 in Room No. 311, Muhibbah Inn Hotel Limbang. In this connection, the defence has contended that there was a break in the chain of evidence with regard to Ex. P32. However, as stated having regard to the evidence of the prosecution witnesses named above, I am satisfied that what was produced as Ex. P32 was the briefcase found by PW6 and PW7 in Room 311, Muhibbah Inn Hotel, Limbang on 10 September 1984 between 11 a.m. and 11.20 a.m. It is implicit in the evidence of the accused in his defence and the submission of his learned Counsel that there is doubt as to whether Ex. P32 was the briefcase so found by PW6 and PW7. In this connection, there is uncontroverted evidence that at the material time as specified above, when the briefcase was found, there was only one briefcase in Room 311 and that the room was occupied by the accused. It was pointed out that not only the accused had access to that room but also the cleaners of the hotel; but there was no suggestion made by the defence that any of the cleaners had replaced the

briefcase brought by the accused to Room 311 with the briefcase produced as Ex. P32. Accordingly, I find no substance in, and I do not accept, the evidence of the defence that it was possible that the briefcase produced as Ex. P32 was not the briefcase brought into Room 311 by the accused when he checked into Muhibbah Inn Hotel.

The evidence for the prosecution, particularly the evidence of PW6 and PW7 shows that the restricted passport of the accused, produced as Ex. P34, was found by PW6 in the briefcase Ex. P32; and it was subsequently brought to the Limbang Police Station together with Ex. P32 and the 14 plastic packets found in the hidden compartment of Ex. P32, and thereafter it was kept in the safe then under the charge of PW9 as OCD Limbang, PW5 testified that on 13 June 1990, he took out from the safe a big package and one small envelope which, on the evidence of PW9, showed that the small envelope contained the restricted passport of the accused. PW5 also deposed that he packed the big package and the small envelope containing the restricted passport of the accused by putting both items in a white plastic bag, and put it in an envelope which was sealed with a green cellotape. He also packed Ex. P32 by wrapping it with a brown paper and sealing it with a green cellotape, and both the envelope and the brown paper were produced as Exs. P39 and P40 respectively, and the envelope containing the restricted passport of the accused Ex. P34, was produced as Ex. P41. Having regard to the evidence of the prosecution witnesses named above, and despite the break in the chain of evidence, I am satisfied that Ex. P34 was the very restricted passport discovered by PW6 in the briefcase Ex. P32 and the passport produced as Ex. P34 was the restricted passport of the accused. Indeed, the photograph and name of the accused appear in that exhibit.

I come now to deal with the 14 plastic packets and their contents found in the hidden compartment of Ex. P32. After their seizure, they were taken to the Limbang Police Station where they were weighed by PW6 and PW7 and then kept in the safe then under the sole charge of PW9 on 10 September 1984. On 12 September 1984 they were taken out from the safe by PW2, wrapped by him and brought by PW6 to the chemistry department, Kuching where on 14 September 1984 he handed the package containing the 14 packets to the chemist, Mr. Tan Ching Chee (PW1). PW1 testified that after receiving the package from PW6 on 14 September 1984 at about 3.30pm, he opened the package and found 14 white envelope all sealed "Police J.S.J. Limbang" and marked respectively "A" to "N". He opened each envelope and found each of them to contain one plastic bag which contained a brownish granular substance. He subsequently weighed these 14 plastic bags and gave evidence as to their respective gross weight totalling 457.58 grammes in all. PW1 also testified that he analysed the light brownish granular substance in each packet and the result was as follows.

Envelope "A" contained 7.55 grammes of heroin;

Envelope "B" contained 9.39 grammes of heroin;

Envelope "C" contained 7.85 grammes of heroin;

Envelope "D" contained 7.86 grammes of heroin;

Envelope "E" contained 9.04 grammes of heroin;

Envelope "F" contained 8.29 grammes of heroin;

Envelope "G" contained 11.94 grammes of heroin;

Envelope "H" contained 6.93 grammes of heroin;

Envelope "I" contained 6.70 grammes of heroin;

Envelope "J" contained 6.06 grammes of heroin;

Envelope "K" contained 9.71 grammes of heroin;

Envelope "L" contained 12.03 grammes of heroin;

Envelope "M" contained 8.92 grammes of heroin; and

Envelope "N" contained 6.20 grammes of heroin;

totalling 118.47 grammes in all. This total weight is the weight specified in the charge against the accused PW1 was cross-examined at some length as to the method by which he made the analysis and came to the conclusion that the contents of the 14 plastic packets were heroin totalling 118.47 grammes. PW1 has explained in detail the methods used by him and has even produced as defence exhibits (Exs. D1 to D4) the charts used by him in the course of the analysis. I am satisfied that the contents of the 14 packets had been properly and accurately analysed by PW1 and I accepted his evidence that the contents of the individual plastic packets numbered as "A" to "N" were as specified by him in his evidence, totalling 118.47 grammes in all. Hence, I find on the evidence as accepted by me, that the contents of the said 14 plastic bags were heroin totalling 118.47 grammes.

PW2 has testified that when he packed the 14 packets before handing them to PW6 on 12 September 1984, each packet was put in an envelope and sealed with "J.S.J. Limbang" and that the envelopes were marked respectively "A" to "N" which were then put in a brown envelope, after which he was not sure whether they were put in a bigger envelope, but the envelope containing the 14 packets was also sealed "Police J.S.J. Limbang" and marked "E1" with an exhibit label attached to it by staple. The evidence of PW1 corroborates the evidence of PW2 that the package handed by him to PW6 was a brown envelope sealed "Police J.S.J. Limbang" and that each of the 14 white envelopes was sealed in the same manner and marked respectively "A" to "N". There is no evidence of any tampering of any of the seals on the envelopes. After analysis, PW1 in his evidence stated that those parts of the contents of the plastic packets marked "A" to "N" which were used by him for analysis were put in separate plastic envelopes which were identified by him in evidence. The remaining parts of the contents of the said 14 plastic bags remained in their original packing and PW1 has identified in respect of each of the 14 items the two packages mentioned by him. I am satisfied on the evidence adduced by the prosecution, in particular the evidence of PW1, PW2, PW4, PW5, PW6, PW7 and PW9 that the 14 plastic bags handed to PW1 by PW6 were the 14 plastic packets found by PW6 on 10 September 1984 at between 11a.m. and 11.20a.m. at Room No. 311. Muhibbah Inn Hotel, Limbang. Accordingly, I find that the prosecution has proved beyond any reasonable doubt on the evidence as accepted by me that the 118.47 grammes of heroin were the amount of heroin analysed by PW1 from the contents of the 14 plastic packets found by PW6 in the hidden compartment of the briefcase Ex. P32.

I now come to the crucial element in so far as the accused is concerned, regarding the allegation of trafficking by him of the said 118.47 grammes of heroin on his own behalf. In this connection, "trafficking" is defined in s. 2 of the 1952 Act as including "the doing of any of the following acts, that is to say, manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, carrying, sending, delivering, procuring, supplying or distributing any dangerous drug." It is to be noted that the definition itself imposes no presumption against any accused person and in my view, that definition requires knowledge by any accused person of any dangerous drug in respect of doing any of the acts specified in that definition. As mentioned, the prosecution is also relying on the presumptions contained in s. 37(d) and (da) of the 1952 Act the relevant provisions of which are as follows:

In all proceedings under this Act or any regulation made thereunder:

(d) any person who is found to have had in his custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug.

(da) any person who is found in possession 15 grammes or more in weight of heroin otherwise than in accordance with the authority of the Act or any other written law, shall be presumed, until the contrary is proved, to be trafficking in the said drug.

For the presumption under s. 37(d) to be raised against the accused, he must have been proved by the prosecution to have had in his custody or under his control the briefcase Ex. P32 at the date, time and place specified in the charge against him. I have earlier found that I am satisfied that the prosecution has proved beyond any reasonable doubt that Ex. P32 was the briefcase found in the room occupied by the accused at the material date, time and place specified in the charge against him. Further, that the evidence shows that was the only briefcase in the room at the material time, place and date specified in the said charge. As already mentioned, the accused in his evidence has alleged, and his learned Counsel has submitted, that there was the possibility of Ex. P32 not being the briefcase carried by him to the said room, but on the evidence as accepted by me, I am satisfied that the briefcase found by PW6 and PW7 was the very briefcase brought by the accused when he checked in at Room 311 at Muhibbah Inn Hotel, Limbang. I do not accept the allegation that it was possible that the briefcase might have been switched by the cleaners of the hotel. In this respect, considering the evidence of PW6 and PW7 against the evidence of the accused who has alleged that when he entered room 311 at about 11 a.m. on 10 September 1984 after returning from his breakfast he found PW6 and PW7 in the said room, I have no hesitation in preferring the evidence of PW6 and PW7 to that of the accused, and I find as a fact on the evidence as accepted by me that when the accused unlocked the door to Room 311, he was followed in by PW7 and PW6, and that when the accused entered that room, it was empty of any persons. In this connection, PW6 has testified that, after ascertaining from PW8 that the accused was the occupant of Room 311 and had not yet returned to the hotel, he instructed PW7 to go upstairs to await the return of the accused, while he himself remained downstairs. PW7 deposed that, before accused returned, he and PW6 tried the door of Room 311 but found it locked. This implied that PW6 had gone upstairs as well. There is therefore a contradiction between the evidence of PW6 and that of PW7 on the point. In this regard, PW8 testified that both PW6 and PW7 had gone upstairs before the accused returned, but added that they then did not have the key to room 311 with them. I accept the evidence PW8 which shows that, without such key, PW6 and PW7 could not have entered the said room before it was opened by the accused on his return. I do not accept the allegation of the accused that both PW6 and PW7 were in room 311 before him on his return. I also accept the evidence of PW6 that the passport of the accused was found in Ex. P32, which would be an additional ground for finding that Ex. P32 was brought by the accused when he checked in at Room 311. Hence, I am satisfied on the evidence as accepted by me that when the said Ex. P32 was found by PW6 in Room 311, it was then in the custody and control of the accused, and that, therefore, the prosecution has succeeded in raising the presumption against the accused under s. 37(d) of the 1952 Act. I am further satisfied on the evidence as accepted by me that the 14 plastic packets containing heroin as analysed by PW1 were found by PW6 in a hidden compartment in Ex. P32 between 11 a.m. and 11.20 a.m. on 10 September 1984 at Room 311, Muhibbah Inn Hotel, Limbang. By virtue of the presumption under s. 37(d), therefore, the accused is deemed until the contrary is proved to have been in possession of the drug in the 14 plastic packets; and further, that until the contrary is proved, he is deemed to have

known that the nature of such drug was heroin. In dealing with this presumption, I shall also consider whether, apart from this presumption raised against the accused, he was, at the material date, time and place specified in the charge against him, trafficking in the said heroin within the meaning of "trafficking" in s. 2 of the 1952 Act.

The evidence of the prosecution against the accused is that, acting on information, PW6 together PW7 followed the accused into his room at the place, date and time specified in the charge, where PW6 discovered the 14 plastic packets containing the quantity of heroin specified in the charge in a hidden compartment in Ex. P32 which was found under the custody or control of the accused. The evidence of the accused includes his cautioned statement produced as Ex. D8 and his own evidence. The accused admitted that Ex. D8 was made by him voluntarily. The gist of Ex. D8 was that the accused was paid RM600 by one Tan Kee Boon @ Ah Chiew for buying air tickets and for lodging when he was asked to bring a bag for the said Tan Kee Boon from Johor Baru to Limbang; and that on arrival at Limbang, the accused, was to wait for the arrival of Tan Kee Boon who would then pay him RM3,000 for the job. He explained that "the job" in Ex. D8 meant bringing the bag to Limbang. The accused in Ex. D8 also stated that he knew that the bag had been modified but he did not know what was hidden in it; but Tan Kee Boon, his towkay, only told him that it was nothing serious. Hence, he took that as indicating that it might contain diamonds or precious items but not drugs. He further stated that he agreed to bring the bag because he trusted his towkay Tan Kee Boon who was a man of 40 years old and had an honest look. The accused also in his evidence deposed that when PW6 ripped open the briefcase that was the first time he saw the hidden compartment. The accused in Ex. D8 also stated that his towkay Tan Kee Boon promised to come to meet him at Limbang on 10 September 1984, because the night before he rang the accused up from Miri that he was coming. In fact, at Johor his towkay told him to go first and that he would follow the next day, but up to the time of the giving of the cautioned statement, the towkay had not turned up.

Ex. D8 also contained the following passage:

> On 10 September 1984 at 11 hours two persons believed to be police officers searched my room at Muhibbah Inn Hotel. They stripped open my bag then only I know it contains something like drugs but I do not know exactly what type of drug. I told myself I am finished. I was then arrested and brought to the Police Station.

In his evidence, the accused stated that the words "contains something like drugs" were said by the police interpreter and he just nodded his head. In other words, that the words were suggested by the interpreter of the cautioned statement and the accused merely confirmed by nodding his head. The accused also stated in evidence that if he had known that the bag contained drugs, he would not have carried it and would not have risked his life for RM3,000 by taking the bag, and that was why he said in Ex. D8 "I told myself I am finished." Further, that he stated "They stripped open my bag" because he had stayed in that room and the bag was found in that room. He maintained that the bag was not his but that of his towkay Tan Kee Boon.

In his evidence, the accused related how he met Tan Kee Boon at a barber shop at Johor Baru after the latter had asked him to carry a bag for him to Limbang. At the barber shop he saw a bag on the floor and Tan Kee Boon asked him to put his clothing in it, and before that the bag was unlocked and there was nothing in it. The accused asked Tan Kee Boon whether there was anything in the bag. The latter answered that there was nothing. The accused also asked Tan Kee Boon whether there was any dangerous item in the bag, whereupon the latter asked the accused not to be afraid and that he would not implicate the

accused. And in answer to another question as to whether there was any dangerous item in the bag. Tan Kee Boon answered that there was no drug in the bag. The accused then put his clothing in the bag and he did not see any false compartment in the bag. He shook the bag when he put the clothing inside it and he did not at any time go with Tan Kee Boon to modify the bag nor did he see Tan Kee Boon put anything in a false compartment in the bag. He reiterated that when Tan Kee Boon stated that there was no drug in the bag, he believed the former; and also reiterated that he thought that there were diamonds or jewellery in the bag. The accused also testified that at Senai, Miri and Kuching airports, the bag went through security checks successfully. The accused testified that after arriving at Muhibbah Inn Hotel at Limbang on 6 September 1984 he telephoned Tan Kee Boon at between 5 and 6 pm telling the latter that he had arrived at Limbang, and that Tan Kee Boon said that he was going to Limbang the same night by plane but did not do so. He waited on 7 and 8 September at Limbang, but Tan did not come. On 9 September, between 5 and 6 p.m. Tan Kee Boon telephoned him and told him that the former would arrive at Limbang on the morning or afternoon of 10 September, between 6 and 9 September, he thought that there were diamonds or jewellery hidden in the bag, but he could not check what was hidden in the bag by checking from outside. As earlier mentioned, the accused stated that when he put his clothing inside the bag, he shook the bag but could not see any modification to the bag. The accused stated that on the morning of 10 September, he took out his clothing and passport from the bag and put them in a drawer in the table of room 311 because he was expecting Tan Kee Boon to arrive after which he would hand the bag to Tan Kee Boon because the latter had telephoned him on the night of the 9th that he would come to Limbang the following day. In this respect, I have earlier stated that on the evidence as accepted by me, I prefer and accepted the evidence of PW6 and PW7 as to the circumstances in the room under which the 14 plastic bags in the hidden compartment of Ex. P32 were found. I do not believe the accused that his passport was not in Ex. P32 when it was found by PW6.

The accused also testified that after going back from breakfast on the morning of 10 September 1984, he took his room key at the corner and met PW8 Miss Chai Lan Hua alias Lorna Chai who was the receptionist and cashier, at the staircase going up to the floor where his room was, and that time PW8 told him in Mandarin that there were people waiting for him upstairs. He then related how he went upstairs, saw nobody at the corridor, opened his room and saw PW6 and PW7 in the room already. In this respect, I have stated that I prefer and accepted the evidence of PW6 and PW7 to that of the accused and I found that when the accused opened the door there was no person in the room and that PW6 and PW7 followed the accused into the room.

The accused then related how PW6 picked up a bag under a table in the room, after which PW6 opened the bag, pressed the two buttons to it and then opened the bag and found nothing in it. PW6 then touched and pressed the bag with his hands and also touched and pressed the outer layer of the bag. The latter then tried to pry open the bag with something like a key and when he did not succeed in doing so, PW6 took the bag out from the room and returned a minute later with a metal object in his hand which PW6 used to pry open the top part of the bag. The top part of the bag was later ripped open by PW6 but the accused did not pay attention to how PW6 did so. The accused further stated that PW6 did not show him what was in the ripped part of the bag and did not say anything to him. The accused further testified that when the photograph Ex. P38C was taken in the room, neither PW6 nor PW7 pointed to the things in the bag and asked him what they were, and that was the first time he saw the things at the cover of the bag. I do not believe the accused that he could not remember Ex. P32 was the bag which was carried by him from Johor Baru to Limbang

because it happened a long time ago. The accused also stated that when PW6 was weighing the drugs, PW7 was there and so was the accused; and that he gave the cautioned statement Ex. D8 after PW6 had weighed the 14 plastic bags. Further, that before he gave his cautioned statement Ex. D8, the recording police officer said that the 14 plastic bags were drugs. In this connection, I do not believe the accused when he later stated that when he gave his cautioned statement, he still did not know that the plastic packets contained drugs. This would appear to be supported by what he earlier stated that before he gave his statement, the recording police officer had already stated that the 14 plastic bags were drugs. I do not believe him when he said that the words in Ex. D8 "They stripped open my bag then only I know it contains something like drugs" were words suggested to him by the interpreter. In this respect, the evidence of PW6 which I accept, shows that upon seeing the discovery of the 14 plastic packets, the accused tried to run out of the room. This meant that the accused saw that what were discovered were the 14 plastic packets which would appear to be consistent with his statement in Ex. D8 that "They stripped open my bag then only I know it contains something like drugs but I do not know exactly what type of drug." Accordingly, after considering the evidence of the prosecution against that of the defence, I find that after the briefcase Ex. P32 part of which was ripped off by PW6 and that 14 plastic packets were discovered in a hidden compartment, the accused saw that it contained something like drugs but he did not know exactly what type of drug. I also accept the evidence of PW6 and PW7 against that of the accused that, on seeing that discovery, the accused tried to run out of the room. In this connection, emphasis has been made by learned defence Counsel that there is a discrepancy between the evidence of PW6 and that of PW7 in that the former had stated that PW7 then chased after the accused and caught the accused when the latter reached the door. In this connection, the evidence of PW7 shows that he managed to catch the accused on the corridor near the room. However, despite this contradiction in the evidence of these two witnesses, having seen and observed them giving evidence in the witness box, and weighing their evidence in the light of the rest of the evidence. I am inclined to believe these two prosecution witnesses that upon the discovery of the 14 plastic packets in the hidden compartment which was seen by the accused, the latter tried to run out of the room but was caught by PW7, PW6 then administered the caution contained in proviso (b) to s. 37A(1) of the 1952 Act to the accused. At first, PW6 stated that in response the accused said: "I have to escape because this is a death sentence case." However, subsequently in answer to the Court, PW6 stated that after the caution was administered, there was no response from the accused and then PW6 asked the accused the question as to why he wanted to run away, through the interpretation of WP7 and this was confirmed by PW7. PW6 further stated that he did not tell the accused that he was not bound to answer his question as put. In this connection, the learned DPP has drawn attention to the case of *PP v. Badruisham bin Baharom* [1988] 2 MLJ 685 where it was held *inter alia* that the cautioned statement was inadmissible on the ground that no proper caution was administered by the recording officer before he recorded the purported cautioned statement from the accused. The omission of the words "to answer any question" rendered the caution defective in law. In my view, the circumstances in that case are different from those in the instant case where a proper caution was administered but after which the accused remained silent and thereafter a question was put to him by PW6 after which there was an answer from the accused. In this connection, s. 37A(2) of the 1952 Act states that "Notwithstanding anything to the contrary contained in any written law a person accused of an offence to which subsection (1) applies shall not be bound to answer any questions relating to such case after any such caution as aforesaid has been administered to him." In my view, the 1952 Act is a written law within the meaning of the Interpretation Act 1957 (see definition of "written law" in s. 2

of the 1952 Act). Further, at the time the question was put by PW6 to the accused, the latter was accused of an offence to which subsection (1) of s. 37A applied. In my view, reading subsection 2 in the light of proviso (b) to subsection (1) of s. 37A of the 1952 Act, if, as in this case, after the caution under proviso (b) to subsection (1) was administered to an accused person and he made no response after the said caution, and then a question was put to him by the person administering such a caution to the accused, then in accordance with the provisions of subsection (2), it is incumbent on the part of that officer to inform the accused that he shall not be bound to answer the question put to him. In my opinion, that this is so is because of the express provisions of subsection 2 containing the requirement that after the caution contained in proviso (b) to subsection (1) was administered to an accused person and he said nothing, any question thereafter put to him by the person administering the caution cannot be covered by the caution as such, because if that were so then there would have been no necessity of making the provision for the requirement as contained in subsection 2, because the caution itself contains the warning that "anything you say whether in answer to a question or not may be given in evidence." In other words, if after the administering of the caution and there was no response from an accused person, and then a question was put to the accused if the situation was covered by the caution, then there would have been no necessity to make the provision as contained in subsection (2). Hence, I am inclined to the view that the answer given by the accused to the question put by PW6 as to why he ran away should not have been admissible in evidence. However, even if I am wrong here, in the circumstances under which the caution was put, I am not satisfied that the accused when he gave the answer clearly understood that he was not bound to answer the question so put by PW5 to him and that such an answer is of very little evidential value. However that may be, the answer given by the accused came after the discovery of the 14 plastic packets which were seen by the accused after they were discovered. I am unable to reach the clear conclusion that in the circumstances under which the question was put to the accused, the answer given by the accused suggests that before such discovery, he knew that the 14 plastic packets were contained in a hidden compartment in Ex. P32.

The accused was cross-examined as to his examination of the bag before he took it over from Tan Kee Boon. He has testified that after shaking it, he found nothing in the bag. The learned DPP made the point that in this respect PW6 after examination, including shaking of the bag, discovered what appeared to him like something under the outer layer at the bottom of Ex. P32 and PW6 also stated that he pressed the outer layer and there seemed to be something inside. In this respect, in cross examination, the accused stated that he picked up the bag and shook it to check whether there was anything in it; and he checked it in order to try to find out whether there was anything else in the bag; and that after shaking he still found nothing in the bag. There is no evidence that other than shaking the bag, the accused did anything else to the bag in order to find whether there was anything hidden in the bag. The accused was further cross-examined as to why there were two beliefs on his part, namely, that when he carried the bag to Limbang he believed that there was nothing in the bag, while at Limbang he thought that it might contain diamonds and other precious items. In this connection, Ex. D8 stated that the accused, after being told by Tan Kee Boon that there was nothing serious, took it to mean that the bag might contain diamonds or precious items but no drugs. On the evidence, I am unable to come to the clear conclusion that the only reasonable inference from these two beliefs of the accused is that at the time he carried the bag, he knew that there were drugs hidden in the hidden compartment of Ex. P32, because one other possibility is that when he first carried the bag at Johor Baru, he believed Tan Kee Boon that it contained nothing after shaking and examining the bag himself, and that

further, on a reflection and thinking about the amount of money he was to be paid for carrying a bag which contained nothing, he though that it might contain something and that something were diamonds or precious items or something else.

The accused in re-examination stated that from Senai airport to Limbang, he did check what was special about the bag but could not find what was special about it. He reiterated that he did not know about the secret compartment, did not see how the bag was modified and did not see Tan Kee Boon putting anything into the special part of the bag. One other matter which should be mentioned is that, after the discovery of the briefcase Ex. P32, the accused has denied that PW6 or PW7 ever asked whose bag it was. Against that, PW6 and PW7 have testified that after such discovery, the accused was asked by PW6 through the interpretation of PW7 as to whose briefcase Ex. P32 was, and the former replied that it was his. In this connection, I accept the evidence of PW6 and PW7 against that of the accused and this would appear to be supported by what was stated in Ex. D8 that "They stripped open my bag". Apart from the presumptions, there is no direct evidence adduced by the prosecution to say that the accused knew about the hidden compartment of Ex. P32 and that the 14 plastic packets subsequently discovered to contain heroin were known by the accused to be in that special compartment when he carried Ex. P32 from Johor Baru to Limbang. The prosecution would appear to have relied on inferences to be drawn from various parts of the evidence, reference to which has already been made. But in this respect, it is to be borne in mind that any such inference can only be drawn when it must be inconsistent with any other hypothesis other than that of the guilt of the accused; and that when more than one inference is capable of being drawn, then no such inference against the accused should be drawn. In this respect, the prosecution has sought to rely on the acts and conduct of the accused prior to, during, and after the search conducted by PW6 and PW7 of Room 311. I have dealt with the question of what transpired after the accused attempted to run away from the room after the discovery of the 14 plastic packets containing the heroin, and the question put to him by PW6 through the interpretation of PW7. Even if the answer of the accused to such a question is to be taken into consideration, in my view, in the circumstances as disclosed by the evidence, it is not the only reasonable inference that such an answer of the accused shows that the accused before the discovery of the 14 packets knew of the hidden compartment in Ex. P32 and that they were hidden there before he took the bag from Johor Baru to Limbang. Hence, no such inference against the accused should be drawn. Likewise, the running away of the accused, because that occurred after the discovery of the 14 packets and, according to the evidence of PW6 after the accused knew of such discovery. In such circumstances, in my view, it is not the only reasonable inference that the running away shows that before the discovery, the accused knew that the 14 packets were hidden in the hidden compartment of Ex. P32. In this connection, it is also to be borne in mind what was stated by the accused in his cautioned statement and evidence that after his arrival at Limbang on 6 September 1984, he rang up Tan Kee Boon and was told that the latter would be arriving the next day; and after the non-appearance of Tan Kee Boon, the latter contacted him on 9 September and informed the accused that he would be arriving on the 10th. There is also the consideration that, according to the evidence of whom I consider to be an independent witness, PW8, during the period the accused was occupying room 311, other than PW6 and PW7, there were no visitors for him. Further, another element that has to be borne in mind is that Ex. P32 was kept by the accused in Room 311 openly, unobscured and unhidden and unlocked. In this connection, it would be strange that had the accused known that Ex. P32 contained such valuable drug as heroin, he would not have taken steps not to have them lying exposed in a bag which was left in the open in the room.

There is one element which I consider to be an important one, and that is the existence of Tan Kee Boon. The accused has throughout maintained both in his evidence and in Ex. D8 that he was merely carrying a briefcase given to him by Tan Kee Boon, and that the latter would take the briefcase back from him subsequently after his arrival at Limbang. The accused stated that Tan Kee Boon did not turn up even after the time he was arrested and in this respect, PW8 has also testified that between 6 and 7 September 1984, the accused did telephone to Johor, but she did not know whom the accused called. This would appear to be not inconsistent with the allegation of the accused that after his arrival at Limbang, he telephoned Tan Kee Boon between 5 and 6 p.m. on 6 September, informing the latter that he had arrived at Limbang; and the latter told him that he would be arriving at Limbang by plane that night. The existence of Tan Kee Boon is not disputed by the prosecution; indeed, it is common ground that Tan Kee Boon had been subpoenaed by the prosecution but not called as a prosecution witness because the subpoena could not be served on him. In this respect, no explanation was given by the prosecution as to why the subpoena could not be served on the said Tan Kee Boon. Tan Kee Boon was offered for cross-examination to the defence, but it was an abortive offer because he was not present to be cross-examined. In this respect, the defence had invited the Court to invoke the presumption under s. 114 illustration (g) of the Evidence Act 1950. Whilst not entirely satisfied that in the instant case such an inference should be drawn against the prosecution. I would be failing in my duty if I do not make the strong observation that where a material witness such in my opinion, as Tan Kee Boon is, should have been called but was not called because the subpoena could not be served on him the Court should have been informed of the circumstances leading to the non-service. In the absence of any satisfactory explanation, any inference to be drawn should be drawn in favour of the accused. In this instance, I do not consider that in the circumstances, in view of the nature of the defence, it is not obvious that Tan Kee Boon would be a material witness, but as already indicated, he was not available because for some undisclosed reason, the subpoena on him could not be served.

The point has also been made by the prosecution that the fact that the accused was offered a total of RM3,000 to carry the bag from Johor Baru to Limbang would have put him on guard as to the suspicious nature of the transaction. However, the accused in his evidence did show that he did ask Tan Kee Boon what was contained in the briefcase and received the reply that there was nothing or that there was nothing serious and that it did not contain drugs and he would not implicate the accused. These are allegations which it is obvious could either be confirmed or contradicted by Tan Kee Boon who was not available to give evidence.

The burden imposed upon an accused person where a statutory presumption is raised against him, in so far as rebuttal against it is concerned, that he need only rebut such a presumption on a balance of probabilities; and the contrary to be proven by him as specified in s. 37(d) and (da) of the 1952 Act is of the same standard of proof. In relation of the presumption in s. 37(d), has the accused succeeded in proving, on a balance of probabilities, that he was not in possession of the 14 plastic packets containing heroin, and that he did not know the nature of such drug being heroin? From what I have considered and expounded above, and because of the absence of Tan Kee Boon to give material evidence in this case, I am of the view that the accused has succeeded in proving, on a balance of probabilities, that at the place, time and date specified in the charge against him, he was not in possession of the 14 packets containing heroin and did not know the nature of such drug being heroin. In this connection, there is a multitude of authorities bearing on what constitutes "possession" in law. I need only refer to the case of *Chan Pean Leon v. PP* [1956] 22 MLJ 237 where it was

held *inter alia* that to establish "possession" for the purposes of criminal law two separate questions are involved. The first is whether the accused party was in possession of the article in question and the second, by reason of the application of the maxim *actus non facit reum nisi mens sit rea*, is whether he had knowledge of the nature of the thing possessed. In reaching this conclusion, I bear in mind what was stated in the case of *PP v. Badruisham bin Baharom* [1988] 2 MLJ 585 where (at p. 590) the learned Judge stated, and with which, with respect, I agree, as follows: "Putting it shortly, one may say that in order to arrive at a finding of knowledge the Court will have to consider the totality of the evidence including any explanations and denials made by the accused and his conduct on the occasion in question." As earlier indicated, the conduct of the accused, when the 14 plastic packets containing heroin were found, does not in my view, give the only inference that he had guilty knowledge of the existence of such 14 plastic packets before their discovery by PW6 and PW7.

In the premises, I find that, having regard to the totality of the evidence, and bearing in mind the standard of proof required to be discharged by the accused in rebutting the presumption under s. 37(d), the accused has succeeded in rebutting the presumption of possession of the heroin specified in the charge, and the presumption of knowing the nature of such drug being heroin.

As to the presumption under s. 37(da) which was relied against him by the prosecution. I have found that the accused has succeeded in rebutting the presumption of possession for the reasons already given. Even on the basis that another presumption of possession is raised against him under s. 37(da), by virtue of the presumption of possession under s. 37(d), has accused succeeded in proving on a balance of probabilities that such a presumption has been rebutted? In this connection, for the same reasons given in relation to the presumption raised under s. 37(d), I find that the accused has succeeded in rebutting on a balance of probabilities the presumption of possession under s. 37(da); and what calls for further consideration is whether he has succeeded in rebutting the presumption of trafficking raised under the same section. In this connection, in my view, it is implicit that before there can be any question of trafficking by the accused, he must know or be presumed to have known the nature of the drug which he is alleged to be trafficking in. For the same reasons as given in relation to the presumption under s. 37(d). I find that the accused has succeeded in rebutting on a balance of probabilities the presumption of trafficking, because he has succeeded in rebutting, on the same standard of proof, knowledge of the drug being heroin at the material place, date and time. This is even more so, in my view, because, for the reasons already given. I have found that the accused has succeeded in proving on a balance of probabilities that he was unaware of the existence of the secret compartment in Ex. P32, and that the 14 packets of heroin were hidden therein; and, as stated, he has therefore succeeded in rebutting on a balance of probabilities the presumption that he was trafficking in heroin, something of which he had succeeded in proving on a balance of probabilities that he had no knowledge at the material place, date and time.

Since I have found that the accused has succeeded in rebutting the said presumptions, it falls upon the prosecution to prove against the accused, beyond any reasonable doubt, all the essential elements comprised in the charge against him. After considering the whole of the evidence, and for the reasons already given, I find that the prosecution has not succeeded in doing so with regard to the accused trafficking in the heroin specified on his own behalf at the place, date and time specified in the charge. Accordingly, I find the accused not guilty of the offence charged against him. He is therefore acquitted and discharged.

In respect of the following exhibits, I make the following order, to take effect after the disposal of any appeal or, if there is no appeal, after the expiry of the period for appeal:

(A) The following exhibits to be destroyed by the police:

(1) Exs. P2(A), P2(B), P2(F), P2(H), P2(I), P2(J), P2(N), P17(C), P17(D), P17(E), P17(G), P17(K), P17(L), P17(M);

(ii) Exs. P3, P4, P5, P6, P7, P8, P9, P10, P11, P12, P13, P14, P15, P16.

(iii) Exs. P18, P19, P20, P21, P22, P23, P24, P25, P26, P27, P28, P29, P30, P31.

(iv) Exs. P32, P33, P36.

(B) Exs. P1, P39, P40, P41 to be handed to police for disposal.

(C) Exs. P34 and P35 to be returned to the accused.

(D) Ex. P42, containing P43 to be returned to the manager of Muhibbah Inn Hotel, Limbang.

Also found at [1990] 2 CLJ 661